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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 910

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM M. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, ET AL., PETITIONERS

vs.

GEORGE P. DAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 20, 1937
CERTIORARI GRANTED APRIL 26, 1937

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM M. WELCH, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MASSACHUSETTS, ET AL., PETITIONERS

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1936.

No. 3221.

GEORGE P. DAVIS,

PLAINTIFF, APPELLANT;

v.

THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON ET AL.,

APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM FINAL DECREE (SWEENEY, J.), JANUARY 27, 1937.

TRANSCRIPT OF RECORD.

EDWARD F. McCLENNEN,
JACOB J. KAPLAN,
for Appellants.

FREDERICK MANLEY IVES,
JOHNSON, CLAPP, IVES & KNIGHT,
for Edison Electric Ill'g Co., Appellee.

ROBERT H. JACKSON,
ASSISTANT ATTORNEY GENERAL,
CHARLES E. WYZANSKI, JR.,
SPECIAL ASSISTANT TO THE ATTORNEY GENERAL,
FRANCIS J. W. FORD,
UNITED STATES ATTORNEY,
ARTHUR L. MURRAY,
SPECIAL ASSISTANT TO UNITED STATES ATTORNEY,
for Commissioner of Internal Revenue et al., Appellees.

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NITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1936.

o. 3221.

GEORGE P. DAVIS,
PLAINTIFF, APPELLANT,
v.
THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON ET AL.,
APPELLEES.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

o. 4399, EQUITY DOCKET.

GEORGE P. DAVIS, PLAINTIFF,
v.
THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON, DEFENDANT.

The bill of complaint in this cause was filed in the clerk's office on he seventeenth day of November, A. D. 1936, and was duly entered t the September Term of this court, A. D. 1936, and is in the words nd figures following:

BILL OF COMPLAINT.
[Filed November 17, 1936.]

George P. Davis of Waltham in the District of Massachusetts, as laintiff, in behalf of himself and all other stockholders in the de-endant who are similarly situated, brings this his bill of complaint gainst The Edison Electric Illuminating Company of Boston, a cor-oration duly organized under the laws of the Commonwealth of Massachusetts and having its usual place of business in Boston in aid District, and says as follows:

FIRST. This suit begun this seventeenth day of November, 1936, is of a civil nature in equity. The matter in dispute exceeds three thousand dollars exclusive of costs. The case arises under the Constitution of the United States of America and the Fifth Amendment thereof in that the plaintiff charges that Title VIII and prominently Sections 804 and 802 of Chapter 531 of August 14, 1935 (49 Stat. 620), commonly called The Social Security Act, is not an Act of the Congress within its powers under the Constitution but is an attempt capriciously to deprive of liberty and to confiscate private property without due process of law and without just compensation. This suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

SECOND. The plaintiff, a citizen of the Commonwealth of Massachusetts and of the United States of America, is the registered and legal holder of shares of the stock of the defendant, The Edison Electric Illuminating Company of Boston, a corporation duly organized under the laws of this Commonwealth with its usual place of business in Boston in said District, and represents a large number of shareholders therein. The plaintiff and said shareholders were at the time of the transactions herein complained of and have been continuously up to the present time such shareholders. The plaintiff brings this bill for himself and for all other shareholders of said corporation who may join herein.

THIRD. The defendant corporation. The Edison Electric Illuminating Company of Boston, is engaged in the business of manufacturing, purchasing, transmitting, distributing and selling electrical energy within the Commonwealth of Massachusetts. It is an employer as that word is used in Sections 804 and 802 aforesaid, in describing the persons subjected to the excise tax described in Section 804 and in the deduction requirements prescribed in Section 802. Said defendant was such an employer throughout the years 1935 and 1936 and proposes to continue to be such throughout the year 1937 and thereafter. Many employees of the defendant receive wages payable on a weekly basis and hence the first deduction required by the terms of Section 802 comes in the first week of the year 1937.

The amount of wages paid by this defendant to its employees is very many thousands of dollars a year.

FOURTH. The terms of said Section 804 are that the defendant shall pay an excise tax with respect to having individuals in its employ equal to the following percentages of the wages paid by the defendant after December 31, 1936. With respect to employment after such date during the years 1937, 1938 and 1939, 1 percent a year; with respect to employment during the years 1940, 1941 and 1942, 1½ percent a year; with respect to employment during the years 1943, 1944 and 1945, 2 percent a year; with respect to employment during the years 1946, 1947 and 1948, 2½ percent a year; with respect to employment after December 31, 1948, 3 percent a year. The terms of said Section 802 are that the defendant shall deduct a like amount from the wages of its employees and pay this sum as a withheld tax in terms imposed on its employees by Section 801 for which additional sum the defendant becomes liable.

FIFTH. Said Sections 804 and 802 in the context of said so-called Social Security Act are not an Act of the Congress within its powers but on the contrary said sections are beyond the powers of the Congress and if enforced would violate the Constitution of the United States and the Fifth Amendment thereof in that said impositions upon the defendant are not an excise tax or any tax of a kind which The Congress of the United States has any power to levy or impose and the said sections are an attempt capriciously to deprive the defendant of liberty of contract with its employees and to confiscate the defendant's private property without due process of law and without just compensation. An excise tax at the time of the adoption of the Constitution of the United States meant and now means solely a tax upon property in being, in use, in transit, in manufacture, or in sale, and the state of being an employer is not such property and even if said impositions were in their nature excise taxes they are capricious and arbitrary in the selection of the objects upon which they are imposed and they are not uniform throughout the United States and they are not imposed for the purpose of general revenue or for any purpose for which The Congress of the United States may impose taxes or excises. According to the figures of the United

States census and according to the figures before the Congress during the period when this matter was under consideration, approximately 44 percent of the gainful workers of the United States are not even potentially benefited by the attempted impositions and their employers are not subjected to the impositions, and approximately only 56 percent are potentially subject to the benefits to accrue from said Title VIII and the employers of said 56 percent are the only ones subjected to the exactions. The discrimination is arbitrary, capricious, and without justification. The attempted Act under which the attempted impositions are made is designed to impose any burden which the States may have to care for the aged, by poor relief or otherwise, upon a portion only of the people not uniformly chosen. It is not done for any welfare which is general, in contrast to local or State, or which is of the Government of the United States.

SIXTH. The plaintiff and others have advised the defendant, The Edison Electric Illuminating Company of Boston, of the claims of unconstitutionality aforesaid and have protested against the making of any payments in accordance with the terms of said Section 804 and the withholdings and payments in accordance with said Section 802. Said defendant has given careful consideration to said protests and to the question of making the payments and the withholdings required by the terms of said Sections 804 and 802, and has decided to make said payments in accordance with the terms of said two sections as rapidly as required by the terms thereof. Further appeals to the defendant, its directors or officers, are useless. The corporation intends, and has announced its intention, and proposes, unless restrained by this court, to make said payments and to make the first of them in the early part of January, 1937, and before January 15, 1937. Said defendant will make said payments at said times unless enjoined by this court.

SEVENTH. If the defendant makes the deductions aforesaid from the wages of its employees it will produce unrest among said employees and the defendant is in danger of being met by the requirement that said employees' wages be correspondingly increased so that said payments will ultimately fall upon the defendant, and so that even if said exactions should ultimately be held to be void the

defendant will have paid sums of money due its employees which as a legal matter the employer may not recover from the recipients thereof and as a practical matter it will be impossible for the defendant employer to recover back. Any payments made by the defendant may not be recovered by it except after long delay, if at all.

EIGHTH. The payments aforesaid are contrary to the rights of the plaintiff and the other stockholders in the defendant, The Edison Electric Illuminating Company of Boston, and by reason of all the foregoing the said defendant corporation and its stockholders will suffer an irreparable loss if it makes the payments aforesaid, and the plaintiff and said other stockholders in whose behalf this bill is brought will be injured in their holdings in many thousands of dollars.

NINTH. The plaintiff tenders herewith such security as the court may require as a condition of obtaining the temporary relief herein prayed for.

Wherefore the plaintiff prays:

(1) That the defendant corporation, The Edison Electric Illuminating Company of Boston, be, before January 1, 1937, forthwith enjoined until the further order of this court from making the payments and deductions defined in Title VIII, Sections 804 and 802, of Chapter 531 of August 14, 1935 (49 Stat. 620), commonly called The Social Security Act.

(2) That said Sections 802 and 804 be held to be not an Act of the Congress within its powers under the Constitution of the United States and the said temporary injunction be made permanent.

(3) That the plaintiff have such other and further relief as to the court may seem just and proper.

By his Attorneys,

EDWARD F. McCLENNEN,
JACOB J. KAPLAN.

At the same term, to wit, November 25, 1936, the following Defendant's Answer was filed:

DEFENDANT'S ANSWER.

[Filed November 25, 1936.]

Now comes the defendant in the above-entitled action and answers the allegations in the several paragraphs in the plaintiff's bill of complaint as follows:

1. The defendant admits the allegations of paragraph First, except the allegation with respect to Title VIII of the Federal Social Security Act, which allegation appears to raise a question of law which the defendant neither admits nor denies.

2. The defendant admits, as alleged in paragraph Second, that the plaintiff is a citizen of the Commonwealth of Massachusetts and of the United States of America and that the bill is brought in behalf of other stockholders of the defendant who may join therein; it says that the plaintiff is the registered holder as co-trustee under an indenture of shares of the defendant's capital stock and has been such stockholder since May 2, 1936; it is ignorant whether, as alleged, the plaintiff represents other shareholders of the defendant and whether such other shareholders were shareholders at the time of the transactions complained of, and neither admits nor denies said allegations.

3. The defendant admits the allegations in paragraph Third.

4. The defendant says that the allegations of paragraph Fourth appear to be merely an abstract of certain provisions of Sections 804 and 802 of said Title VIII of the Federal Social Security Act and believes them to be correct statements of the parts of said sections which are abstracted.

5. The defendant says that whether said Sections 804 and 802 are unconstitutional, whether they fail to impose a true excise tax, whether they are arbitrarily discriminatory, and whether they promote the general welfare, as alleged in paragraph Fifth, are questions of law which the defendant neither admits nor denies; it further says that it is ignorant whether the allegations with respect to figures of the United States census and figures before the Congress are true and neither admits nor denies the same.

6. The defendant admits the allegations in paragraph Sixth.

7. The defendant says that the allegations in paragraph Seventh are prophecies with respect to what may occur in the future and the defendant neither admits nor denies said allegations.

8. The defendant says that the allegations of paragraph Eighth appear to raise questions of law which the defendant neither admits nor denies.

THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON,
by its Attorneys,
FREDERICK MANLEY IVES,
JOHNSON, CLAPP, IVES & KNIGHT.

Also at the same term, to wit, November 30, 1936, the following Motion for Injunction Forthwith and for Final Decree with accompanying affidavit was filed:

MOTION FOR INJUNCTION FORTHWITH AND FOR FINAL DECREE WITH ACCOMPANYING AFFIDAVIT.

[Filed November 30, 1936.]

The plaintiff moves on bill and answer and on the affidavit presented herewith in support of the truth of the bill, that an injunction issue forthwith as prayed for in the bill of complaint and that a final decree be entered forthwith as prayed for therein.

By his Attorneys,
EDWARD F. McCLENNEN,
JACOB J. KAPLAN.

November 27, 1936.

To Frederick M. Ives, Esq., Attorney for Defendant, 50 State Street, Boston, Massachusetts.

We shall present the above motion, and accompanying affidavit, for allowance by the District Court in the court room presided over by the Honorable George C. Sweeney at twenty-five minutes past ten o'clock in the morning on Monday, November 30, 1936.

EDWARD F. McCLENNEN,
JACOB J. KAPLAN.

Notice received November 27, 1936.

FREDERICK MANLEY IVES.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION.

COMMONWEALTH OF MASSACHUSETTS,
DISTRICT OF MASSACHUSETTS, ss. November 18, 1936.

I. George P. Davis, the plaintiff in the above-entitled bill of complaint, on oath depose and say that I have read the bill of complaint filed in this case in this court on November 17, 1936, and that the allegations of the First, Second, Third, Fourth, Seventh and Ninth paragraphs thereof are true of my own knowledge and that as to the allegations of the Fifth, Sixth and Eighth paragraphs thereof I have been credibly informed and verily believe and charge that they are true.

GEORGE P. DAVIS.

Subscribed and sworn to, before me,

BERTHA A. PATTEN,
Notary Public.

[SEAL]

On the said thirtieth day of November, A. D. 1936, the following Motion for Leave to File Petition to Intervene was filed:

MOTION FOR LEAVE TO FILE PETITION TO INTERVENE.

[Filed November 30, 1936.]

Now come Guy T. Helvering and William M. Welch, your petitioners, by their attorneys, Francis J. W. Ford, United States Attorney for the District of Massachusetts, and Arnold Raum, Special Assistant to the Attorney General of the United States, and move the court for leave to file their intervening petition herein, which intervening petition accompanies this motion.

FRANCIS J. W. FORD,
United States Attorney,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney,

ARNOLD RAUM,
Special Assistant to the Attorney General.

11-30-36. GEO. C. SWEENEY.

Also on the said thirtieth day of November, the following Order Granting above Motion was entered:

ORDER GRANTING MOTION FOR LEAVE TO FILE PETITION TO INTERVENE.

November 30, 1936.

This cause coming on to be heard on the thirtieth day of November, 1936, on the motion of Guy T. Helvering and William M. Welch for leave to file a petition to intervene in the above entitled suit, and the motion having been duly considered:

It is therefore ordered, adjudged and decreed that said motion be, and hereby is, granted.

GEO. C. SWEENEY,

United States District Judge.

Thereupon, on said thirtieth day of November, A. D. 1936, the following petition to intervene of Guy T. Helvering and William M. Welch was filed:

PETITION TO INTERVENE OF GUY T. HELVERING AND WILLIAM M. WELCH.

[Filed November 30, 1936.]

Now come Guy T. Helvering and William M. Welch, your petitioners, by their attorneys, Francis J. W. Ford, United States Attorney for the District of Massachusetts, and Arnold Raum, Special Assistant to the Attorney General of the United States, and respectfully allege and show as follows:

1. The petitioner Guy T. Helvering is United States Commissioner of Internal Revenue, officially stationed at Washington, D. C.

2. The petitioner William M. Welch is United States Collector of Internal Revenue for the District of Massachusetts, officially stationed at Boston, Massachusetts.

3. The above entitled cause was commenced in this court by the filing of a bill of complaint on November 17, 1936. The petitioners are informed that the defendant has filed an answer on November 25, 1936, to said bill of complaint.

4. Said bill of complaint is brought by George P. Davis, alleging

that he is the holder of an unspecified numbes of shares of stock of the defendant, The Edison Electric Illuminating Company of Boston, and seeks a temporary injunction against said defendant's paying the taxes which may become due from said defendant under Title VIII, Section 804, of the Social Security Act, Act of August 14, 1935, c. 531, 49 Stat. 620, U. S. C., Title 42, c. 7.

Said George P. Davis also seeks to have said corporation temporarily enjoined from making deductions from the wages of the employees of said defendant of such amounts as may be required to be collected by employers from employees under Title VIII, Section 802, of said Social Security Act, and from paying over such amounts in accordance with the terms of said provisions. Said George P. Davis asks further that such temporary relief be made permanent. The bill of complaint alleges that Sections 802 and 804 of said Social Security Act are not an Act of Congress within its powers under the Constitution of the United States and asks that they be so declared.

5. The petitioners have a direct interest in this litigation inasmuch as all such taxes as are imposed by Sections 802 and 804 of said Social Security Act are required to be collected by the United States Bureau of Internal Revenue and inasmuch as the petitioner, Guy T. Helvering, as Commissioner of Internal Revenue, is the head of said Bureau, and William M. Welch, as Collector of Internal Revenue for the District of Massachusetts, is the officer of the United States charged with the duty of collecting United States internal revenue taxes in the District of Massachusetts.

6. The interest of these petitioners was recently recognized by this court in permitting them to intervene in the cause of *George P. Davis* v. *Boston and Maine Railroad*, Equity No. 4392, a similar proceeding in which complaining stockholder sought to enjoin the defendant corporation from paying taxes under Title IX as well as under Title VIII of said Social Security Act. Further, the interest of the petitioners herein is such that they could properly have been named parties defendant. *Hill* v. *Wallace*, 259 U. S. 44, 45, 62–63; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 278–279.

Wherefore, petitioners pray that this court make an order granting

them leave to intervene herein as defendants with leave to file on or before the twentieth day from the date of such order, an answer herein, and for such other and further relief as to this court seems just.

FRANCIS J. W. FORD,
United States Attorney,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.
ARNOLD RAUM,
Special Assistant to the Attorney General.

November 30, 1936.

UNITED STATES OF AMERICA.
DISTRICT OF MASSACHUSETTS,
COUNTY OF SUFFOLK, ss.

Arnold Raum, Special Assistant to the Attorney General of the United States, being duly sworn, deposes and says that he is the attorney for the petitioners named in the foregoing petition, that he is acquainted with the facts, that he has read the contents of the petition, and that the statements made are true as he verily believes.

ARNOLD RAUM.

Sworn to before me this thirtieth day of November, 1936.

CHARLES A. ROME,
Notary Public.

[SEAL]

Also on said thirtieth day of November, A. D. 1936, the following Orders were entered:

ORDER GRANTING PETITION TO INTERVENE.

November 30, 1936.

This cause coming on to be heard on the thirtieth day of November, 1936, on the petition of Guy T. Helvering and William M. Welch to intervene in the above entitled suit and to be made parties defendant thereto, and the petition having been duly considered, and it appearing to the court that said Guy T. Helvering and said William M.

Welch have an interest in the above entitled suit sufficient to warrant them in becoming parties to this suit:

It is therefore ordered, adjudged and decreed this thirtieth day of November, 1936, that Guy T. Helvering and William M. Welch be, and they hereby are, granted leave to intervene in said suit, as parties defendant, with leave to file, on or before the nineteenth day from the date of this order, an answer herein.

GEO. C. SWEENEY,
United States District Judge.

ORDER RELATIVE TO HEARING.
November 30, 1936.

The above-entitled case is set this thirtieth day of November, 1936, for hearing on the merits on bill and answer and motion for injunction forthwith on January fifth, 1937, at Boston Mass., briefs to be filed on or before January fifth, 1937.

GEO. C. SWEENEY,
United States District Judge.

This cause was thence continued to the present December Term, A. D. 1936, when, to wit, December 18, 1936, the following motion of Guy T. Helvering and William M. Welch to strike part of plaintiff's bill of complaint is filed:

MOTION OF GUY T. HELVERING AND WILLIAM M. WELCH, INTERVENING DEFENDANTS, TO STRIKE PART OF THE PLAINTIFF'S BILL OF COMPLAINT.
[Filed December 18, 1936.]

Now come Guy T. Helvering and William M. Welch, intervening defendants in the above-entitled cause, and move the court to strike from the plaintiff's bill of complaint filed on the seventeenth day of November, 1936, in the above-entitled cause, so much of said bill of complaint as relates to the tax imposed upon employees by Title VIII of the Social Security Act (c. 531, 49 Stat. 620), to wit: in the paragraph designated "First", the phrase "and 802"; in the paragraph designated "Third", the phrase "and 802", the words "and in the deduction requirements prescribed in Section 802", and the next to

the last sentence of said paragraph; in the paragraph designated "Fourth", the last sentence thereof; in the paragraph designated "Fifth", all references to Section 802, the taxes involved in said section, and all allegations with respect thereto; in the paragraph designated "Sixth", all references to Section 802 and the withholding and payment of taxes involved therein; the entire paragraph designated "Seventh"; such portions of the paragraph designated "Eighth" as may relate to the tax imposed upon employees by Title VIII of the Social Security Act, as aforesaid; and so much of the prayer for relief as relates to Section 802 of said Social Security Act, and to deductions and payments provided for in said Section 802.

This motion is made on the ground that the taxes involved in Sections 801 and 802 of the Social Security Act, as aforesaid, are imposed upon employees; that the defendant employer, not being subject to tax under those provisions, does not have any standing to challenge the validity of such taxes; and that the plaintiff, whose rights are at most derivative from the defendant, has even less standing to challenge the validity of such taxes.

FRANCIS J. W. FORD.
United States Attorney,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

On the said eighteenth day of December, A. D. 1936, the following answer of Guy T. Helvering et al. is filed:

ANSWER OF GUY T. HELVERING AND WILLIAM M. WELCH, INTERVENING DEFENDANTS.

[Filed December 18, 1936.]

Come now Guy T. Helvering, Commissioner of Internal Revenue, and William M. Welch, Collector of Internal Revenue for the Collection District of Massachusetts, intervening defendants in the above entitled cause, by Francis J. W. Ford, United States Attorney in and for the District of Massachusetts, their attorney, and pursuant to leave granted by this court on November 20, 1936, and without waiving any of their rights and defenses under the motion filed herein

to strike parts of the plaintiff's bill of complaint, but expressly relying upon the same, as fully and completely as if the grounds of said motion were repeated herein, and expressly reserving unto themselves all manner of exceptions to the errors and insufficiencies of the bill filed herein and to the jurisdiction of the court in the premises, and relying on same as if motion to dismiss were interposed; nevertheless, answering so much and such parts of the bill of complaint herein as they are advised it is material or necessary for them to make answer unto, say:

1. For answer to the first paragraph of the bill, these defendants admit that this is a suit of a civil nature in equity, but they say that they are without knowledge as to whether the matter in dispute exceeds $3,000, exclusive of interest and costs. For further answer to the first paragraph of the bill, these defendants aver that the averments therein contained with respect to Title VIII of the Social Security Act are conclusions of law which they are not called upon to answer. Further answering, these defendants deny each and every averment in the first paragraph of the bill not herein specifically admitted.

2. For answer to the second paragraph of the bill, these defendants admit that the plaintiff is a citizen of the Commonwealth of Massachusetts and of the United States of America, and that the defendant corporation is organized under the laws of Massachusetts and has its usual place of business in Boston. These defendants are without knowledge with respect to whether the plaintiff is the registered and legal holder of shares of stock of the defendant corporation, and whether plaintiff represents a large number of shareholders therein, or with respect to any of the other averments contained in the second paragraph of the bill.

3. Answering the third paragraph of the bill, these defendants are without knowledge as to any averments of fact therein contained. These defendants deny the materiality and accuracy of the arguments, legal conclusions and averments set forth in said paragraph with respect to definitions, use of words, scope or effect of either Section 802 or 804 of the Social Security Act, and for a true, correct, and complete statement of the provisions of said Act applicable herein

these defendants respectfully refer the court to said sections of the Act. Further answering the third paragraph of the bill, these defendants aver that the taxes imposed by Section 802 of the Act are not involved herein, and that all averments with respect to the provisions of said section or its application herein are redundant, irrelevant and immaterial.

4. Answering the fourth paragraph of the bill, these defendants admit that said Act provides, in part, as recited in the fourth paragraph of the bill; but, however, for a true, correct, and complete statement of the provisions of the Social Security Act, these defendants respectfully refer the court to the said Act.

5. Answering the fifth paragraph of the bill, these defendants deny that Sections 804 and/or 802 in the context of the Social Security Act are not an act of the Congress within its powers; deny that said sections, or either of them, are beyond the powers of the Congress; deny that, if enforced, or otherwise, said sections, or either of them, would violate the Constitution of the United States and/or the Fifth Amendment thereof; deny that the taxes imposed by said sections, or either of them, upon the defendant corporation, are not an excise tax and/or any tax of a kind which the Congress of the United States has power to levy and/or impose; and deny that either of said sections is an attempt capriciously, or otherwise, to deprive the defendant, or any other person, of liberty of contract with its employees, or with any other person or persons, and/or to confiscate the defendant's private, or other, property without due process of law, and/or without just compensation, or at all. Further answering the fifth paragraph of the bill, these defendants deny both the materiality and the accuracy of plaintiff's conclusions with respect to the meaning of an excise tax, and assert that the averments with respect thereto are mere conclusions of law which these defendants are not called upon to answer. As to the figures of the United States census or the figures before the Congress when the Social Security Act was under consideration, or the percentage of gainful workers, or those subject to benefits to accrue under Title VIII of said Act, or those not subject to the benefits thereof, or subject to the exactions or impositions of tax thereunder, these defendants say that they are without

knowledge with respect thereto. Further answering, these defendants deny that the, or any, discrimination is arbitrary, capricious, and/or without justification, and aver that there is no discrimination either in fact or in law in the application of the provisions of the Social Security Act. These defendants further deny that the Act is designed to impose any burdens which any of the States may have to care for the aged, by poor relief, or otherwise, upon a portion only of the people, not uniformly chosen, or at all, and deny that it is not done for any welfare which is general in contrast to local or State, or which is of the Government of the United States, or otherwise. Further answering the fifth paragraph of the bill, these defendants deny each and every averment of fact, if any, therein contained. Further answering the fifth paragraph of the bill, these defendants aver that the plaintiff herein is not in any position to challenge in this suit the propriety or legality of the tax which has been imposed by the Congress upon employees in Title VIII of the Social Security Act.

6. Answering the sixth paragraph of the bill, these defendants aver that they are without knowledge with respect to any of the averments therein contained. Further answering the sixth paragraph of the bill, these defendants deny the materiality of any of the averments therein with respect to Section 802 of the Social Security Act and the deductions and payments therein provided. Further answering the sixth paragraph of the bill, these defendants aver that the taxes imposed by Section 802 of the Act are not involved herein, and that all averments with respect to the provisions of said section or its application herein are redundant, irrelevant and immaterial.

7. Answering the seventh paragraph of the bill, these defendants aver that the averments therein contained are wholly immaterial to any issue involved in this cause, but if deemed by the court to be material, these defendants deny that, if the defendant corporation makes the, or any, deductions therein referred to from the wages of its employees, it will produce unrest among said employees, or at all; deny that said defendant is in danger of being met by the, or any, requirement that the wages of said employees be correspondingly, or otherwise, increased; deny that said payments will ultimately, or at

all, fall upon said defendant; deny that, if said exactions should be ultimately held to be void, said defendant will have paid sums of money due its employees which as a legal matter, or otherwise, the employers may not recover from the recipients thereof; and deny that as a practical matter, or otherwise, it will be impossible for the defendant employer to recover back. These defendants further deny that any payments made by the defendant corporation may not be recovered by it, if it is legally entitled to recover said payments.

8. Answering the eighth paragraph of the bill, these defendants deny that any of the payments described in the bill are contrary to the rights of the plaintiff and/or any of the other stockholders in the defendant corporation; deny that for any reason whatsoever the defendant corporation and/or any of its stockholders will suffer an irreparable or other loss, or at all, if it makes the, or any, payment described in the bill; and deny that the plaintiff and/or any of its other stockholders would be injured in their holdings or otherwise in many thousands of dollars, or in any amount whatsoever.

9. These defendants deny each and every averment contained in the bill of complaint not hereinbefore admitted, qualified, explained, or denied.

10. For further and separate defense to the bill of complaint, these defendants reserve and rely upon all of the grounds set forth in their motion to strike certain portions of the bill filed in this cause, and say:

a. That so much and such parts of said bill of complaint as refer to Section 802 of the Social Security Act are redundant, irrelevant and immaterial.

b. That the plaintiff herein is not in any position to challenge in this suit the propriety or legality of the tax which has been imposed by the Congress upon employees in Title VIII of the Social Security Act.

11. For further, separate and complete defense to the bill of complaint, these defendants say that the bill of complaint sets forth no facts which, if true, would entitle plaintiff to the relief prayed for in a court of equity.

Wherefore, having fully answered the bill of complaint, these de-

fendants pray that the bill be dismissed and that they recover their costs herein.

GUY T. HELVERING,
Commissioner of Internal Revenue.

WILLIAM M. WELCH,
Collector of Internal Revenue for the Collection District of Massachusetts.

FRANCIS J. W. FORD, *United States Attorney,*
Solicitor for Intervening Defendants,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

William M. Welch, being duly sworn according to law, says that he is one of the intervening defendants in the above entitled cause, and that the facts set forth in the foregoing answer of intervening defendants to bill of complaint, which are within his knowledge, are true and correct, and the facts averred upon information received from others are based upon information received from reliable sources and which he verily believes to be true; and all of which the intervening defendants expect to be able to prove on the trial of this cause. WILLIAM M. WELCH.

Sworn and subscribed to before me this nineteenth day of December, 1936. GRACE E. LINEEN,
[SEAL] *Notary Public.*

At the present December Term of this court, A. D. 1936, this cause is submitted on briefs of both parties in accordance with the order of November 30, 1936, and on the twenty-seventh day of January, A. D. 1937, an opinion of the court is announced, denying the prayer for injunction and dismissing bill.

Thereupon to wit, January 27, 1937, the following Final Decree is accordingly entered:

FINAL DECREE.

January 27, 1937.

SWEENEY, J. This case came on this twenty-seventh day of January, 1937, for the entry of a final decree pursuant to the opinion handed down this day; and thereupon, upon consideration thereof, be it and it is hereby

Adjudged, ordered and decreed that the plaintiff or the defendant corporation has not such an interest in the collection and payment of the income taxes assessed under Title VIII of the Social Security Act as would entitle them to question the constitutionality of the income tax feature and that Section 804 of said Title VIII imposes a valid excise tax on the defendant corporation and that therefore the prayer for an injunction is denied and the bill of complaint is dismissed.

By the Court,

ARTHUR M. BROWN,

Deputy Clerk.

1-27-37.

GEO. C. SWEENEY.

From the foregoing final decree, the plaintiff claimed an appeal on January 28, 1937, to the United States Circuit Court of Appeals for the First Circuit, which appeal was allowed by the court on the same day.

OPINION.

January 27, 1937.

SWEENEY, J. This is a suit in equity in which the petitioner, a stockholder in the respondent corporation, seeks to enjoin the corporation from paying (a) taxes levied by Title VIII of the Social Security Act against the respondent, and (b) taxes levied by the same title against employees of the respondent which is charged with the duty of withholding the said tax from the wages of its employees, and remitting it to the Treasurer of the United States. The United States Commissioner of Internal Revenue and the United States Collector of Internal Revenue for the District of Massachusetts have been allowed to intervene as parties defendant.

Findings of Fact.

The petitioner is the registered and legal owner of an unknown number of shares of stock of the respondent. The respondent is an employer within the meaning of Sections 804 and 802 of the Social Security Act. By Section 804 of the Act, the respondent is charged with the payment of an excise tax "with respect to having individuals in (its) employ" in accordance with the table of percentages contained in that section. Section 802 of the Act charges the employer with the duty of collecting, by deductions from the wages of employees, an income tax assessed against employees in accordance with the table of percentages set forth in Section 801 of the Act.

The basis of the petitioner's complaint is that Sections 804 and 802 of the Social Security Act are unconstitutional as not being within the powers of the Congress to enact. The petitioner has made representations of the unconstitutionality of the Act to the respondent. Nevertheless, the respondent has decided to make the payments as required by the Act. The petitioner, alleging that the payments by the corporation are being made or are to be made under an unconstitutional Act of Congress, brings this suit to restrain the respondent from making such payment. The intervening defendants, hereinafter referred to as the Government, have filed a motion to strike the portions of the petitioner's bill that complain of the tax imposed upon employees by Section 802 of Title VIII. The basis for the motion is that as the respondent is merely an agency for the collection of the taxes assessed against the employees, and is not subject to tax under this Section, it has no standing to challenge the validity of that Section, and that the petitioner whose rights are derivative from the respondent corporation has no better standing than the corporation.

Conclusions.

This case has been submitted to the court on the pleadings, the Government asking for a dismissal of the action. The petitioner alleges in his bill that the deduction of the tax from the employees' wages will cause unrest amongst them, and thereby result in injury to the corporation. At best this is mere conjecture, and, if threat-

ened, is too remote to consider as a proper basis for the relief asked. It does not appear that the petitioner, or even the corporation, has such a protected legal interest in the collection and the payment of the income taxes assessed against the employees as would entitle them to question the constitutionality of the income tax feature. In *Frothingham* v. *Mellon,* 262 U. S. 447, 488, the court, in discussing its power to pass on constitutional questions, stated: "We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." I am of the opinion that the petitioner has not stated such a cause of action as would entitle him to question the validity of the income tax feature of Title VIII.

Section 804 of Title VIII imposes an excise tax upon employers "with respect to having individuals in his (its) employ" based upon a percentage of wages paid by the said employers. Considering this section by itself, and not as it may be related to other Titles of the Social Security Act, it is identical with Section 901 of Title IX as a tax raising measure. Section 901 of Title IX has been held by this court to be a valid exercise of the taxing powers reposed in Congress, complying with the limitation of uniformity, and is a measure to provide for the general welfare of the United States, and is therefore constitutional. (See *Davis* v. *Boston & Maine Railroad.*) Everything that this court has said in that case is equally applicable to Section 804 of Title VIII. I therefore rule that the tax laid down by Section 804 of Title VIII of the Social Security Act is constitutional.

The contention is made that Titles VIII and II should be consid-

ered together because Title VIII is the taxing measure to provide the funds to be expended under Title II. The complete answer to this contention is that the various Titles of the Act are separable (Section 1103 of Title XI). The Act makes provision that the funds collected under Title VIII go into the general Treasury of the United States to be there subject to any and all valid appropriations. If we are to presume that the expenditures under Title II of the Act would be held in the future to be beyond the powers of the United States to make, it does not neecssarily follow that Title VIII as a tax raising measure would fail. No such situation is presented here as was presented in *United States* v. *Butler*, 297 U. S. 1, where the funds collected were earmarked for a particular purpose which was held to be not within the powers of the Congress to regulate. In the present instance, Title VIII is self sufficient as a tax raising measure, and I am of the opinion, and therefore hold, that it is constitutional. This petitioner has no standing in the present case to question the expenditures of the money raised under Title VIII until such time as the money raised under Title VIII is appropriated for the purpose of Title II, or for any other purpose. We are not to assume that such expenditure will be unconstitutional.

The prayer for an injunction is denied, and the bill is to be dismissed.

PLAINTIFF'S PETITION FOR APPEAL AND ASSIGNMENTS OF ERROR.

[Filed January 28, 1937.]

The plaintiff, aggrieved by the final decree entered in this case this day and by the proceedings on which the same was based in the respects described in the assignments of error herewith, appeals to the Circuit Court of Appeals for the First Circuit from said final decree and prays that this its claim of appeal may be allowed and that the transcript of the record upon which the said decree was based, duly authenticated, may be sent to said Circuit Court of Appeals.

PLAINTIFF'S ASSIGNMENTS OF ERROR.

1. The plaintiff assigns that the District Court erred in deciding that the plaintiff and the defendant corporation did not have such an

interest in the income taxes to be withheld and paid over by the corporation under Section 802 of Title VIII as would entitle them to question the constitutionality of the income tax feature.

2. The plaintiff assigns that the District Court erred in deciding that Section 804 of Title VIII imposes a valid excise tax on the defendant corporation and that therefore the prayer for injunction is denied and the bill of complaint is dismissed.

By its Attorneys,

EDWARD F. McCLENNEN,
JACOB J. KAPLAN.

Appeal allowed and bond approved but not as a supersedeas.

GEO. C. SWEENEY,
United States District Judge.

1-28-37.

On the twenty-eighth day of January, A. D. 1937, a bond on appeal was filed in the sum of $250, the Hartford Accident and Indemnity Company acting as surety. Said bond on appeal was approved by the court, but not as a supersedeas, on the same day.

PLAINTIFF'S PRAECIPE.

[Filed January 28, 1937.]

In preparing the record the clerk will please include only the following:

1. Bill of complaint.

2. Defendant's answer of The Edison Electric Illuminating Company of Boston, filed November 25, 1936.

3. Motion for injunction forthwith filed November 30, 1936.

4. Affidavit in support of application for preliminary injunction.

5. Motion for leave to file petition to intervene by Guy T. Helvering and William M. Welch filed November 30, 1936.

6. Order granting motion for leave to file petition to intervene filed November 30, 1936.

7. Petition to intervene of Helvering and Welch filed November 30, 1936.

8. Order granting petition to intervene entered November 30, 1936.

9. Order relative to hearing entered November 30, 1936.

10. Motion of Helvering and Welch to strike filed December 18, 1936.

11. Answer of Helvering and Welch filed December 18, 1936.

12. Opinion of Judge Sweeney handed down January 27, 1937.

13. Final Decree entered pursuant thereto.

14. Petition for appeal and assignments of error.

15. Notation of appeal bond, and citation, and acceptance of service.

EDWARD F. McCLENNEN,
JACOB J. KAPLAN,
Attorneys for Plaintiff.

Praecipe approved.

FREDERICK MANLY, Jr.,
Attorney for The Edison Electric Illuminating Company of Boston.

FRANCIS J. W. FORD,
United States Attorney,
by ARTHUR L. MURRAY,
Special Assistant to the United States Attorney,
Attorneys for Defendants Helvering and Welch.

A citation on appeal was issued on January 28, 1937, and was made returnable in the United States Circuit Court of Appeals thirty days from date. Service of said citation was duly accepted by the attorney for The Edison Electric Illuminating Company of Boston and by the United States Attorney.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the plaintiff, including true copies of such proofs, entries and papers on file as have been designated by praecipe in the cause entitled,

No. 4399, EQUITY DOCKET.

GEORGE P. DAVIS, PLAINTIFF,

v.

THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON, DEFENDANT,

in said District Court determined.

And I further certify that transmitted herewith are the originals of the petition for appeal, the bond on appeal and the citation on appeal with the acceptance of service thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court at Boston, in said District, this fourth day of February, A. D. 1937.

[SEAL] JAMES S. ALLEN, *Clerk.*

PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On February 12, 1937, this cause came on to and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James J. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the fourteenth day of April A. D. 1937, the following opinion of the Court and Dissenting Opinion was filed:

United States Circuit Court of Appeals for the First Circuit

No. 3221.—October Term, 1936

GEORGE P. DAVIS, PLAINTIFF, APPELLANT

v.

THE EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, WILSON, and MORTON, JJ.

Opinion of the court

April 14, 1937

WILSON, J.: This is a bill in equity brought by a stockholder of the defendant company seeking to enjoin the defendant from paying the tax imposed on it by Sec. 804 of Title VIII of Chap. 531, 49 Stat. 620, known as the Social Security Act, on the ground that the tax is not one authorized by Sec. 8 of Art. I of the Constitution of the United States, that the Act infringes the rights of the States, and imposes a capricious and arbitrary burden on those whom it affects.

The District Court of Massachusetts held Secs. 801 and 804 of Title VIII were valid exercises of powers of Congress within the field of federal authority, and that the funds collected from such taxes go into the treasury of the United States and are there subject to such appropriations as Congress sees fit to make, since they are not "earmarked" as collected for any particular purpose, and therefore a taxpayer cannot object to an action by Congress in appropriating funds in the United States treasury.

The plaintiff appealed and assigned as errors that the District Court erred in holding that the plaintiff had no standing to question the validity of the tax imposed by Sec. 801, and that the District Court erred in holding that Sec. 804 imposed a valid excise tax on the defendant.

It is contended by the government that, whatever is decided with reference to the validity of the tax on employers under Sec. 804, the tax on the employees under Sec. 801 is a valid income tax. Standing alone it may well be, but whether it can be considered as within the intent of Congress that it shall be enforced if the other features of Title VIII are held invalid or must fall with the tax on the employers, may well be questioned.

The government also contends that Title VIII has no direct relation to Title II, or, if so, Title II of the Act is a valid exercise of the power of Congress to appropriate money in the treasury for any purpose it may deem for the general welfare of the United States.

The assistance of those incapacitated by age from earning a livelihood is one of the powers belonging to, and burdens imposed on, the States at the time of the adoption of the federal Constitution. If so, the power to deal with it was expressly reserved to them under the Tenth Amendment. It is not to be lightly assumed that the several States whose governments are much closer to their people than Congress is, have failed in this duty as their people see it. But even if they have and Congress is right in its view that the aged are entitled to more definite and more generous assistance than they have received from the several States, the failure of the States (in the opinion of Congress) would not operate to extend the power of the federal government over this distinctly state field. The principle involved in the argument for the government, although it is not so stated, is that in any field reserved to the States, in respect to which in the opinion of Congress the States are not doing their duty, it may step in and take the matter out of their hands under the "general welfare" clause. It was not denied by counsel for the government that Congress could, if it saw fit, take over general education in the same indirect way, by establishing its Board of Education and taxing heavily the States whose systems did not conform to the ruling of the Board. Obviously, this principle, if accepted, marks the end of responsible state government. We are not unmindful of the argument that the increasing unification of the country in economic and industrial fields and the competition among the States to extend their industries make the States reluctant to impose burdens for old age assistance which would handicap their industries, and that the matter should therefore be dealt with by the federal government, thereby equalizing such burdens throughout the country. The argument applies to many other aspects of daily life besides old age assistance. There are those who urge that our frame of government should be greatly revised. Such considerations are plainly not for the courts. Their duty is to enforce the stated boundaries between the federal and the state governments as they now exist. They have not hesitated, for instance, to strike down state laws which interfered with the federal power over interstate commerce. It is equally their duty to strike down federal laws which interfere with the power of the States.

It is true that the plaintiff's bill as drawn raises no issue as to the validity of Title II, nor does Title VIII in any way refer to

the provisions of Title II as indicating the purposes for which the taxes under Title VIII are imposed. If Title II bears no relation to the provisions of Title VIII, then it may be that the plaintiff has no standing to question the validity of Title II under Massachusetts v. Mellon, and Frothingham v. Mellon, 262 U. S. 447; but there are indications in both Title II and Title VIII, when taken together, that the taxes imposed under Secs. 801 and 804 of Title VIII, while not earmarked in the sense counsel for the government contends, are to be construed together. Both Titles are a part of an Act entitled:

"An Act To provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provisions for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; to establish a Social Security Board; to raise revenue; and for other purposes."

It is apparent from the language of Secs. 202 and 210 of Title II and Sec. 811 of Title VIII that it was the intent of Congress that the taxes raised in Secs. 801 and 804 of Title VIII were imposed for the express purpose of paying the old age benefits provided for in Title II. It is not within reason to suppose that Congress would by Sec. 801 of Title VIII compel employees to give up three percent of their earnings, if it were not contemplated that it would ensure them the benefits provided for in Title II.

We think that the power to provide for "old age benefits" was among those powers reserved to the States under the Tenth Amendment, and that a tax imposed to benefit slightly over half of the people over sixty-five years of age and who are the care or burden of the States, cannot be said to be imposed for the general welfare of the United States and the taxes under Title VIII would fail for this reason.

Following the reasoning of our opinion in the recent case of George P. Davis v. Boston & Maine Railroad Company, we think the tax imposed with respect to having individuals in one's employ cannot be upheld as an excise tax authorized under Sec. 8 of Art. I of the Constitution, for the reason stated in the opinion in that case, since it was a tax on the natural and common right of employing labor, and is not a tax on property manufactured, sold or in use, or on a privilege granted by any government, and was not within the purview of the framers of the Constitution or the people in adopting it.

The power vested in Congress under Sec. 8 of Art. I of the Constitution is undoubtedly a broad power and covers a wide range of taxable subjects, but that it was intended by those adopting the Constitution that it should reach every possible relation between employer and employee was a subject for taxation, we cannot agree. Certain particular vocations in which the public may have an inter-

est, such as attorneys, inn-keepers, or auctioneers, may be subject to excise taxes, as was said in Thomas v. United States, 192 U. S. 363; but the right to employ labor in ordinary business is not a commodity or a privilege that is subject to a tax. Congress may tax the right to do certain kinds of business, or corporations holding a franchise from a state, based on their income, as in the case Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397; Flint v. Stone Tracy Co., 220 U. S. 107. It has never been held, however, either by the Supreme Court of the United States, or the Supreme Court of any state, so far as we are advised, that Congress had the power to tax the common right to employ labor. It is like taxing a person's right to work.

Such a levy was held not to be within the taxing power of the Canadian Parliament. Canada Law Reports, 1036, Part VII, p. 454. In effect, it was held in this case that employment of labor was not a privilege derived from the Canadian government, and an excise tax on the right to employ was beyond the powers of the Canadian Parliament and invalid.

In the case of James v. Commonwealth of Australia, 1936, A. C. 578, in which the British Privy Council held that an Act of the Commonwealth of Australia to control and limit the products of agriculture was unconstitutional, Lord Wright, Master of the Rolls, said:

"But these inconveniences are liable to flow from a written constitution. Their Lordships cannot arrive at any conclusion save that they could not give effect to the respondents' contention consistent with any construction of the constitution which is in accord with sound principles of interpretation. To give that effect would amount to rewriting, not construing, the constitution. That is not their Lordships' function."

The limitation upon the power to impose excise taxes was well stated in the opinion of the Justices in 247 Mass. 589, 593:

"The right to set up and maintain theatres and other places of amusement is not natural and inherent. Working by an artisan at his trade, carrying on an ordinary business, or engaging in a common occupation or calling, cannot be subjected to a license fee or excise."

Again, on page 597, the Justices said:

"The rights to labor and to do ordinary business are natural, essential, and inalienable, partaking of the nature of personal liberty and of private property."

If Congress can tax the common right to employ labor and appropriate the money so collected to any object it sees fit, however it may concern the domestic affairs of the States, and the courts are powerless under the decision in Massachusetts v. Mellon and Frothingham v. Mellon, 292 U. S. 447, the States will soon, under the policy of recent Congresses, be reduced to "mere geographical subdivisions of the national domain."

"'The Constitution in all its provisions looks to an indestructible Union, composed of indestructible states.' Every journey to a forbidden end begins with the first step; and the danger of such a step

by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their power, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified." Carter v. Carter Coal Co., 298 U. S. 238, 295.

"It is not the province of the court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the federal constitution does not provide for it." Schechter Corp. v. United States, 295 U. S. 495.

The recent legislation of the so-called National Recovery Act, the Agricultural Adjustment Act, the Guffey Coal Act, the Railroad Retirement Act, and the Child Labor Act, all remind us that, unless the courts are continually on guard to preserve the dual form of our government as founded by our forefathers, the States will indeed become mere "geographical subdivisions of our national domain."

It cannot be sustained that such a tax as the one imposed under Sec. 804 of Title VIII was clearly within the purview of those who adopted the Constitution or the framers thereof, and where the application of a taxing statute is doubtful it should be resolved against the government. Gould v. Gould, 245 U. S. 151; United States v. Merriam, 263 U. S. 179, 187–188.

It is also urged by counsel for the plaintiff that if the taxes imposed under Secs. 801 and 804 are held for the purpose of paying the old age benefits provided for under Title II, there is additional basis for holding them invalid on the ground that to except those classes defined in Sec. 210 of Title II from the benefits of the tax is both capricious and arbitrary, and that such exactions cannot be justified as a tax, since it would violate the Fifth Amendment of the Constitution. Both men and women in the excepted classes, on reaching the age of sixty-five, are equally entitled to "old age benefits" as those engaged in other lines of work, since need is not essential to entitle one to the benefits.

We are, therefore, of the opinion that whether the taxes levied under Title VIII are levied for the purposes set forth in the preamble of the Act, or as defined in Title II, the imposition of such taxes is not a valid exercise of the power vested in Congress under Sec. 8 of Art. I of the Constitution of the United States.

The decree of the District Court is reversed with one bill of costs to the plaintiff, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

BINGHAM, J. (dissenting): The constitutionality of Section 801, Title VIII, levying an income tax on employees is not open to question by the plaintiff, a stockholder in the defendant corporation.

The defendant corporation has no interest in the tax. It merely withholds it from the employee's wages. It does not pay the tax, and certainly the plaintiff-stockholder does not. As neither one pays or has any interest to protect, neither can question its validity. Massachusetts v. Mellon, 262 U. S. 447.

The only question in this case, therefore, is the constitutionality of Section 804 of Title VIII, laying an excise tax on the employer. The contention of the appellant is that it does not lay a valid excise tax.

Under this section, the subject of the tax is any employer of labor in a trade or business, except farm labor, domestic service in a private home, casual labor not in the course of the employer's trade or business, services of an individual of the age of sixty-five, of an officer or member of a crew, of one in the employ of the United States Government or of its instrumentalities, or in the employ of a State, or political subdivision thereof, or an instrumentality of one or more States or political subdivisions, services in the employ of a corporation or organizations organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the earnings of which enures to the benefit of any private shareholder or individual. The object of the tax is the act of having individuals in the employer's trade or business during a given calendar year. And the measure of the tax is the wages earned and paid employees over and above $3,000 in that year.

The tax is to be collected by the Bureau of Internal Revenue and paid into the Treasury of the United States as internal revenue collections.

I regard the tax as an excise, lawfully laid, for the collection and payment of general revenue into the Treasury of the United States. See my dissent in Davis v. Boston & Maine Railroad Co., filed April 14, 1937.

On the same day, to wit, April 14, 1937, the following Final Decree was entered:

Final decree

April 14, 1937

This cause came on to be heard February 12, 1937, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, April 14, 1937, here ordered, adjudged, and decreed as follows: The decree of the District Court is reversed with one bill of costs to the plaintiff, and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court:

ARTHUR I. CHARRON, *Clerk.*

Clerk's certificate

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages numbered 1 to 34, inclusive, contain and are a true copy of the record and all proceedings to and including April 17, 1937, in the cause in said court numbered and entitled, No. 3221, George P. Davis, plaintiff, appellant, v. The Edison Electric Illuminating Company of Boston et al., appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this seventeenth day of April, A. D. 1937.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1937

Order allowing certiorari

Filed April 26, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

○